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Supreme Court, U.S.
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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, AND
HOUSTON GENERAL INSURANCE COMPANY,
Petitioners,

vs.

MISSISSIPPI STATE HIGHWAY COMMISSION AND
DOES I THROUGH XX, INCLUSIVE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

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June 3, 1991

QUESTIONS PRESENTED

1. Does a state supreme court deny a plaintiff his constitutionally guaranteed access to the courts by rendering a decision on issues not before it and/or by mischaracterizing the plaintiffs' complaint?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Employers Insurance of Wausau, a Mutual Company, and Houston General Insurance Company, and the respondents Mississippi State Highway Commission. Petitioner Employers Insurance of Wausau, a Mutual Company, has no parent company and no subsidiaries. Petitioner Houston General Insurance Company is wholly owned by Houston General Company, whose parent company is Tokyo Fire & Marine, Ltd., of Tokyo, Japan. Petitioner Houston General Insurance Company is owner of Traders and General Insurance Company and Traders & Pacific Insurance Company. Petitioner Houston General Insurance Company also acts as attorney in fact for Houston General Lloyds.

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vs.

MISSISSIPPI STATE HIGHWAY COMMISSION AND DOES I THROUGH XX, INCLUSIVE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

The petitioners Employers Insurance of Wausau and Houston General Insurance Company respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Mississippi Supreme Court,

entered in the above-entitled proceeding on March 6, 1991.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court is unreported but is reprinted in Appendix "A" hereto, p. A1 *infra*. The modified opinion of the Mississippi Supreme Court is reported at 575 So. 2d 999 (Miss. 1990) but is reprinted in Appendix "B" hereto, p. A9, *infra*.

The Opinion and Order of the Circuit Court of Hinds County, Mississippi has not been reported. It is reprinted in Appendix "C" hereto, p. A16, *infra*.

JURISDICTION

The petitioners invoke the jurisdiction of this Honorable Court pursuant to 28 U.S.C. § 1257(3) and Supreme Court Rule 10 from a final decision entered by the Mississippi Supreme Court in which the Court ruled

on issues which had not been briefed to it by either of the parties.

STATEMENT OF THE CASE

This action arose out of a contract between the Mississippi State Highway Commission (hereinafter the "Commission") as owner and Cook Construction Company (hereinafter "Cook") as contractor to resurface a portion of Interstate 55 located between Glukstadt, Mississippi, and Highway 22 in Madison County, Mississippi. Under the contract, the Commission wrote and provided Cook with the plans and specifications for a required pavement mixture to be applied to the highway, and, in so doing, the Commission impliedly warranted that a reasonably safe and suitable road service would be achieved. Cook complied fully with these plans and specifications; however, the resulting road surface was unreasonably dangerous and slippery.

Due to this condition, three individuals, Kenneth Sebren, Ivory Chambers and Alvin Russell Clark (hereinafter "Assignors"), were injured seriously in separate automobile accidents. These three men assigned all of their *rights of action in warranty* against the Commission to these petitioners, Employers Insurance of Wausau (hereinafter "Wausau") and Houston General Insurance Company (hereinafter "Houston General").

On November 4, 1987, Wausau and Houston General proceeded to file suit in the Circuit Court of the First Judicial District of Hinds County, Mississippi, against the Commission on the basis of the *simple breach of the warranty implied* in the contract. On December 2, 1987, the Commission filed a Motion for Summary Judgment on two alternative grounds: (1) that the suit was barred by the doctrine of *sovereign*

immunity from tort liability, and (2) that the suit was barred because a provision of the contract had specifically prevented any action by third-party beneficiaries. On March 16, 1988, Wausau and Houston General responded to this motion, contending that the action was not barred on either prong for: (1) it was *not* based upon the failure to perform a duty created *ex delicto* but instead on the *contractually derived implied warranty*, and (2) the contract provision *expressly* permitted an action by a third party *to the extent allowed by law*. On December 20, 1988, the trial court entered an opinion and order granting the motion, holding that the third-party beneficiary contract provision did prohibit Wausau and Houston General's claims. In rendering this decision, the court specifically commented that the *plaintiffs' claim* of "whether implied warranties expose state agencies to what would

otherwise be tort liability", an issue "of first impression in this state", *would not be reached.*

An appeal was timely made to the Mississippi Supreme Court from this order. The only issue available to be briefed by the parties concerned whether the third-party beneficiary contract provision did foreclose the possibility of this suit; no mention was or could be made of the issue of sovereign immunity. Following submission of briefs and oral argument, a decision was rendered by the Supreme Court on December 19, 1990. In this opinion, the Court refused to address the briefed issue concerning the trial court's handling of the third-party beneficiary provision; instead, the Court gratuitously construed that the appellants' simple warranty claims were "tortious" in nature and therefore barred by the doctrine of sovereign immunity. The Court went on to state that this basis

was "so clearcut" that there was no reason to even remand the case to the trial court; *however*, acknowledging that this "tort" immunity issue (which was never addressed by the trial court sitting as trier of fact) was never "directly addressed by the parties", the Court "invited" the filing of a Petition for Rehearing to discuss the relevance of sovereign immunity, upon which the Court had already ruled peremptorily and without benefit of any fact finding process by the trial court.

On January 7, 1991, Wausau and Houston General filed a Petition for Rehearing, fully outlining their simple implied warranty contractual (not tortious breach of warranty) theory of action and detailing to the Mississippi Supreme Court why their theory could not be defeated through a defense of sovereign immunity to tort claims. In conclusion, Wausau and Houston

General expressed the opinion that it would be unquestionably *unjust* to mischaracterize or to re-characterize their claim in a manner inconsistent with the pleadings and for the Court to decide the claims on a basis not then before it. Despite this, on March 6, 1991, the Mississippi Supreme Court summarily denied this Petition, refusing to either acknowledge the contractual theory upon which this action was always expressly based or to remand this action to the Circuit Court of Hinds County, Mississippi, for a complete proceedings and a hearing on it. Instead, the Court merely removed the language inviting Wausau and Houston General to file a Petition on this issue and re-instated its previous opinion.

REASONS FOR GRANTING THE WRIT

I.

Beyond doubt there exists a fundamental right of access to the courts protected by the United States Constitution. It is basic to our system of government that the right to sue and defend in the courts must be maintained. This right rests upon three independent grounds. First, the United States Supreme Court has viewed this right of access as "one of the privileges and immunities accorded citizens under Article 4 of the Constitution and the Fourteenth Amendment." *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983), citing *Chambers v. Baltimore and Ohio Railroad*, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907). The Court has also recognized that "access to the courts is protected by the First Amendment right to petition for redress of grievances." *Wilson v. Thompson*, 593 F.2d 1375, 1387

(5th Cir. 1979). *See also*, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *Coastal Sales Marketing, Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983); *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972); *Harris v. Pate*, 440 F.2d 315 (7th Cir. 1971); *Pizzolato v. Perez*, 524 F. Supp. 914 (E.D. La. 1981); *Crews v. Pertrosky*, 509 F. Supp. 1199 (W.D. Pa. 1981). The final basis of this right of access to the Courts is "founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 2986, 41 L.Ed.2d 935 (1974). *See also*, *Ryland*, 708 F.2d at 972; *Mitchum v.*

Purvis, 650 F.2d 647 (5th Cir. 1981); *Rudolph v. Locke*, 594 F.2d 1076 (5th Cir. 1979).

The courts have maintained that the "mere formal right of access to the courts does not pass constitutional muster"; the access must be "adequate, effective, and meaningful." *Ryland*, 708 F.2d at 972, citing *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 1495, 52 L.Ed.2d 72 (1977). Interference with this right of acces would give rise to a basis for relief. *See Ryland, id.*; *Sigafus v. Brown*, 416 F.2d 105 (7th Cir. 1969). In this regard, at least one court has held that a state supreme court decision could interfere unconstitutionally with this right of access.

In the case of *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Hawaii 1977), the United States District Court for Hawaii dealt with a group of individuals and companies who sought to enjoin the

enforcement of a decision of the Hawaii Supreme Court that determined that all surplus water in the streams of Hawaii was the property of the state. That decision had been rendered *sua sponte* and had not been directly related to the issues actually raised in the trial proceedings. The parties had never briefed the issues nor had they been given the opportunity to argue the question before the Hawaii Supreme Court; however, the Court had extended to them the invitation to petition for a rehearing. After the filing of such a petition, the Court summarily denied it and affirmed its earlier opinion. In deciding to grant the injunctive relief sought by the petitioners, the United States District Court held that:

> . . . the effect of the judgment of the Supreme Court was to deprive the plaintiffs of their property, water and water rights, without affording any of them an opportunity to be heard in their defense. The state court violated not

> only its own rules, but the state law as well, by deciding the case on issues that were never raised or argued.
>
> Thereafter on the almost farcical "rehearing," although the due process issues were urged by the plaintiffs, the court refused to permit argument thereon or consider the same. Rather, the court extended a clearly *pro forma* invitation to the plaintiffs to "prove to us why we were wrong" on issues and conclusions assumed *sua sponte* and decided *sua sponte* by the court.
>
> On this basis alone the judgment of the court would have to be declared void, for if permitted to remain in full force and effect, plaintiffs have been deprived of property rights without ever having had a fair and meaningful opportunity to defend against their being handed over to the state on a silver platter without even a request by the state for the gift.

441 F. Supp. at 580.

The facts involved in the *Robinson* case are almost on all fours with the case presently before this Court. Like the Hawaii Supreme Court, the Mississippi Supreme Court has consistently held that it sits "as an

appellate court, not as triers of the facts *ab initio*." *Allgood v. Allgood*, 473 So. 2d 416, 421 (Miss. 1985), citing *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201, 205 (Miss. 1984). *See also Johnson v. Black*, 469 So. 2d 88, 90 (Miss. 1985). The court has expressly held that it has "no facilities for hearing proof on factual issues" and "can determine the rights of the parties only on the basis of the record." *Burnside v. Burnside*, 228 Miss. 180, 86 So. 2d 333, 334 (1956). Despite these express pronouncements, the Mississippi Supreme Court in the present case has gone beyond the record presented to it and made findings of fact *ab initio*. In so doing what it has held it cannot do, the Mississippi Supreme Court, like the Hawaii Supreme Court, has violated the constitutional requirements to provide the petitioners a full and adequate hearing, even at the trial, level on their claims.

Additionally, the Mississippi Supreme Court's invitation to the plaintiffs in the present case to petition for a rehearing, like that in *Robinson*, was nothing more than a mere formality. The court never allowed the plaintiffs to reargue those issues and summarily denied the petition without comment. This too is a clear violation of the petitioners' constitutional right of access to the courts.

The petitioners have conceded throughout this action that if their claims solely involved a *tortious* breach of warranty then that action would be barred by the doctrine of sovereign immunity. However, this simply is not and never has been an expression of the basis of their action; it does not arise out of negligence or any other tort theory, but from the failure of the Commission to perform its obligations under the contract, thereby breaching its implied warranty which

ran with the contract. This is precisely the distinction which was reached by the Alabama Supreme Court in the case of *Sims v. Etowah County Board of Education*, 337 So. 2d 1310 (Ala. 1976), when it held:

> It will be observed that a negligent failure (emphasis added) to perform a contract express or implied . . . is but a breach of the contract. But if in performing it, it is alleged that defendant negligently caused personal injury or property damage to plaintiff, the remedy is in tort, for it is not the breach of a contract express or implied, but the breach of an implied duty to exercise due care not to injure plaintiff . . . which is the gravamen of the action . . . .

337 So. 2d at 1313; citing *Vines v. Crescent Transit Co.*, 264 Ala. 114, 119, 85 So. 2d 436 (1955).

It has been generally accepted in Mississippi that a political subdivision may be charged with liability over its defective plans and specifications on a contractual implied warranty theory. This was clearly set forth in the case of *Mayor and City Council of Columbus,*

Mississippi v. Clark-Dietz and Associate Engineers, Inc., 550 F. Supp. 610, 625 (N.D. Miss. 1982), in which the court, relying on the opinion of *Trustees of the First Baptist Church, Corinth, Mississippi v. McElroy*, 223 Miss. 327, 334, 78 So. 2d 138, 141 (1955), stated:

> The majority of the cases base it on an implied warranty by the owner that the plans and specifications are suitable for the particular purpose coupled with an absence of express warranty by the contractor in regard at the sufficiency of the plans and specifications.

It has further been held that "[t]here is no mutuality or fairness where a state or county can enter into an advantageous contract and accept its benefits but refuse to perform its obligations." *C.I.G. Contractors v. Mississippi State Building Commission*, 399 So. 2d 1352 (Miss. 1981).

The implied warranty existing in public contracts, such as the one which forms the centerpiece of the present action, has long been acknowledged:

> A warranty that ground is of a specially stable character, or that it is free from quicksand, or of the character referred to in the plans and specifications, will not be implied in the absence of an express stipulation that there is a warranty in favor of the contractor, that the ground selected should be of a defined character, or unless an unavoidable implication to that effect arises.
>
> * * *
>
> But positive assertions as to the nature of the work belong to a different category. Upon these a contractor has the right to rely without independent investigations to prove their falsity. While ordinarily a contractor assumes subsidence of the soil in the particular site upon which he is to erect a structure, and assumes the adequacy of existing systems of drainage in such place where he is working, yet if in the process of constructing a public work such as a dry dock, the public body by contract provision directs the relocation of a sewer in such place and provides the character, dimensions and

> location of the sewer, the articles of the contract prescribing these import a warranty that if the specifications are complied with the sewer will be adequate, and this implied warranty will not be overcome by general clauses requiring the contractor to examine the site, to check up the plans and to assume responsibility for the work until completion and acceptance.

J.F. Donnelly, A Treatise on the Law of Public Contracts, § 158, 248-49 (1922).

The Mississippi Supreme Court has consistently held that "when the legislature authorizes the State's entry into a contract, the State necessarily *waives its immunity from suit for breach of such a contract.*" *C.I.G. Contractors v. Mississippi State Building Commission*, 399 So. 2d 1352 (Miss. 1981); *see also Mississippi State Department of Public Welfare v. Howie*, 449 So. 2d 772 (Miss. 1984); *Mississippi State Building Commission v. S & S Moving, Inc.*, 475 So. 2d 159 (Miss. 1985). Despite this clear authority, the

Mississippi Supreme Court in the present case has chosen to ignore its own precedent in finding that the petitioners' breach of contract claims are barred by that doctrine of sovereign immunity.

In this case an implied warranty derived from the contract between the Commission and Cook that a reasonably safe and suitable road surface would be achieved if Cook followed the Commission's plans and specifications. Furthermore, because that warranty was breached in Mississippi, Cook had (and pursued successfully) a right of action against the Commission for its own compensation, likewise founded solely in contract. But privity of contract as a prerequisite for filing an action based on the breach of a contract provision is no longer required. Miss. Code Ann. § 11-7-20 (as amended 1976) unambiguously provides:

> In *all* causes of action for personal injury or property damage or economic

> loss brought on account of negligence, strict liability *or* breach of warranty, including all actions brought under the provisions of the Uniform Commercial Code, *privity shall not be a requirement to maintain said action.*

Use of the disjunctive manifests legislative acknowledgement that negligence, strict liability and warranty actions are not synonymous with one another in any respect, yet they share the common abolition of privity as a precondition to the bringing of an action for damages. Further, the Mississippi Supreme Court has made it abundantly clear that privity is not required in any breach of warranty case, be that tortious or contractual. In the case of *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670, 673 (Miss. 1983), the court stated unequivocally that a "plain reading of the statute clearly suggests that it was the legislative intent to remove the privity requirement in all cases." *See also Hicks v. Thomas*, 516 So. 2d 1344, 1348 (Miss. 1987). If

privity has been abrogated absolutely, as consistently held by Mississippi's Court, then Assignors and any other member of the public may maintain a cause of action for breach of the implied warranty contained within this contract. If the Assignors may maintain such an action, then petitioners' access to the courts of Mississippi have been withheld wrongly.

It is unconscionable that the Commission might evade its contractual liability through its own, let alone a judicial re-characterization of the petitioners' claims as sounding in tort, and a so-called "clear-cut" finding that this action is barred by the doctrine of sovereign immunity. This was not the case when the action rested in the trial court; the *undue* re-characterization process did not begin until this case reached the Mississippi Supreme Court. And that Court's finding that this

action is barred by sovereign immunity does not rest upon either law or fact, but footless whimsy.

There has never been a full, adequate, and fair hearing on the plaintiffs' claims in this case. Fundamental due process mandates "that a judicial proceeding afford the affected parties *an* opportunity to be heard on the allegations asserted in the complaint and to present evidence and argument on the contested facts and legal issues framed by the answer to the complaint." *Thompson v. Madison County Board of Education*, 476 F.2d 676, 678 (5th Cir. 1973). *See also, Monroe Division, Litton Business Systems v. DeBari*, 562 F.2d 30, 33 (10th Cir. 1977). In the present case it is clear that the petitioners never were afforded that basic opportunity to be heard and to have their claims properly litigated on the issued framed by their complaint. These petitioners have no other route to take

than to appeal to this Honorable Court to correct the constitutional violations directed against them by the Mississippi Supreme Court. If the Mississippi courts' action is allowed to stand unchallenged, it will be at liberty to open any record or write a new one at its pleasure. To refuse to hear and decide these claims is an exercise of power no court can justly claim to hold. The doors of the courts will be closed to petitioners forever and due process will be denied them if this petition is not granted. *Atkins v. United States*, 556 F.2d 1028, 1040 (Ct. Cl. 1977). Therefore consideration of this matter by this Court is essential.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioners would emphasize that this is the only forum and opportunity open to them to seek redress of the violations of their

constitutional rights by the Mississippi Supreme Court. If the petitioners are correct in urging that the Mississippi Supreme Court acted in violation of the petitioners' constitutional rights of access to the courts, the matter should be remanded to the Mississippi Supreme Court for *appropriate* disposition in conformity with any ruling from this Court and in compliance with the United States Constitution, which may include, without limitation, ultimate remand to the trial court for consideration and resolution of any issues not rendered moot by the Mississippi Supreme Court's review of the issue first appealed from the Circuit Court of Hinds County.

Respectfully submitted,

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June 3, 1991

APPENDIX

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-CA-0667

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, AND HOUSTON GENERAL INSURANCE COMPANY

v.

MISSISSIPPI STATE HIGHWAY COMMISSION AND DOES I THROUGH XX, INCLUSIVE

BEFORE HAWKINS, P.J., SULLIVAN AND BLASS, JJ.

HAWKINS, PRESIDING JUSTICE, FOR THE COURT:

Employers Insurance of Wausau, a Wisconsin-based insurance corporation (Wausau), and Houston General Insurance Company, a Texas-based insurance

corporation (Houston), appeal from a summary judgment dismissal of their complaint against the Mississippi State Highway Commission (Commission) in which as assignees of injured parties they sued the Commission for breach of its implied warranty that Commission's plans and specifications to a contract for resurfacing would provide a reasonably safe highway. The circuit judge found there was no contractual liability for such injury. We find that the Commission, as an agency of the sovereign state, is immune from such liability and affirm.

FACTS

The Commission on December 8, 1982, contracted with Cook Construction Company (Cook) to resurface a portion of Interstate 55 from Glukstadt to Highway 22 in Madison County. The contract required Cook to apply a pavement mixture designed and

manufactured in accordance with plans and specifications provided by the Commission.

Cook followed the plans and specifications of the Commission in manufacturing the pavement mixture, but the mixture was defective, resulting in an unreasonably slick highway. Due to this condition, three different automobiles on three different occasions had accidents causing severe injuries to three individuals.

On June 11, 1985, Cook filed a suit against the Commission in the chancery court of the First Judicial District of Hinds County for defective plans and specifications furnished it by the Commission. This action was later settled.

Kenneth Sebren was injured on July 13, and thereafter Ivory Chambers was injured August 10, and Alvin Russell Clark injured September 16, 1983, all from automobile accidents on the portion of the highway

which had been resurfaced. Each of them either filed a suit against Cook, or made demand on Cook for personal injury damages. Cook's liability insurance carriers reached compromise settlements with these individuals and their wives, and were assigned their respective claims against the Commission.

On April 3, 1986, Kenneth R. Sebren and his wife Harriet in consideration of $55,000 to himself, $75,000 to Harriet, and $20,000 to Lumberman's Underwriting Alliance to reimburse that company for worker's compensation benefits, all paid by Wausau and Houston, executed a complete release of Cook and its carriers, and assigned all rights they had against the Commission to Wausau and Houston. On March 26, 1986, Alvin Russell Clark and his wife executed the same type of document for $20,000. Also, on March 27, 1986, Ivory Chambers and his wife Louella

for $188,904.37 being paid to him, and $11,095.63 being paid to New Hampshire Insurance Company as reimbursement for worker's compensation benefits, executed the same type of document to Wausau and Houston.

Wausau and Houston filed a complaint against the Commission in the circuit court of the First Judicial District of Hinds County. The complaint charged that Cook was contractually obligated to apply a mixture for resurfacing designed and manufactured in accordance with the plans and specifications provided Cook by the Commission. The complaint further alleged that there was as a matter of law an implied warranty by the Commission that if Cook followed this recipe a reasonably safe, suitable road surface would result. Cook complied, followed the Commission's recipe, which resulted in a hazardous, dangerous surface. The

complaint further alleged that Sebren, Clark and Chambers suffered severe personal injuries as a result of this slick, defective highway, and finally that as assignees of these individuals the plaintiffs were entitled to $600,000 damages for injuries to Chambers, $450,000 damages for injuries to Sebren, and $60,000 damages for injuries to Clark.

On December 2, 1987, the Commission filed a motion for summary judgment and dismissal of the action. The motion first alleged that plaintiffs sought damages as indemnees of Cook, but there was no showing that Cook had paid any sum as a result of the negligence of the Commission. Secondly, the motion raised the defense of sovereign immunity.

The plaintiffs responded that their claim was not one for indemnity but on behalf of the persons protected under the implied warranty of the Commission to

furnish plans and specifications providing for a reasonably safe surface on the highway.

The circuit judge sustained the motion by order dated December 20, 1988, which provided in pertinent part:

> The precise issue of sovereign immunity put by this case, where implied warranties expose state agencies to what would otherwise be tort liability, is one of first impression in this state. That issue need not be reached, however, because this court concludes that this action is barred by the terms of the contract on which it is based. Incorporated into this contract is a provision which provides as follows:
>
> > 107.15 - Third Party Beneficiary Clause:
> >
> > It is not intended by any of the provisions of any part of the contract to create the public or any member thereof a third party beneficiary hereunder, or to authorize anyone not a party to this contract to maintain a suit

> for personal injuries or property damage pursuant to the terms or provisions of this contract. The duties, obligations and responsibilities of the parties to this contract with respect to third parties shall remain as imposed by law.

This provision is clear and unambiguous and bars this action. Accordingly, it is hereby,

Ordered, that the Motion for Summary Judgment filed on behalf of the defendant Mississippi State Highway Commission be and the same is hereby GRANTED.

LAW

Wausau and Houston have appealed, alleging the contract was ambiguous, citing another section, and contending that summary judgment was improper. We decline to reach the contract provisions, however, because this suit is not based upon any specific contract provisions, but an implied warranty arising from the

contract to furnish plans and specifications to Cook providing for a reasonably safe and suitable highway. Under that theory, any claim for damages by Wausau and Houston as assignees of these individuals must be in tort, and for this reason the doctrine of sovereign immunity applies.

We first note that Wausau and Houston make no claim that the Commission, as an agency of the State of Mississippi, does not possess all the attributes of state sovereign immunity. They simply argue that sovereign immunity does not apply to the Commission's implied warranty to furnish reliable plans and specifications to Cook. We also note that they make no claim as indemnees of Cook. We therefore have no occasion to address whether there would be liability on the part of the Commission if it did not enjoy sovereign immunity but were instead a private person, or what rights Cook

might have asserted, or perhaps did assert in its cause against the Commission.

In *Engle Acoustic & Tile, Inc. v. Grenfell*, 223 So. 2d 613 (Miss. 1969), a subcontractor sued the project architect for damages caused by his failure to carry out his contractual duties. We noted that the contract was between the architect and owner, and "that one not a party to a contract can sue for a breach thereof only when the condition which is alleged to have been broken was placed in the contract for his direct benefit. A mere incidental beneficiary acquires by virtue of the contractual obligation no right against the promisor or the promisee." *Id.* at 620.

A Florida case, *A. R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 400-401 (Fla. 1973), extended the liability of an architect beyond the owner for negligently defective plans and specifications, based, however, upon

tort liability, thereby abolishing privity in a negligence claim. *Mac Pherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

To like effect is *Shoffner Industries, Inc. v. W. B. Lloyd Construction Co.*, 42 N.C. App. 259, 257 S.E.2d 50, (1979), where the North Carolina Court of Appeals in rejecting an architect's defense of privity in a suit by a contract for negligently defective plans, stated:

> We think, however, that the expansion of liability to third parties now establishes the proposition that a contractor hired by the client to construct a building, although not in privity with the architect, may recover from the architect any extra costs resulting from the architect's negligence. To hold otherwise would require that we ignore the modern concepts of tort liability, first established by *Mac Pherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). We cannot ignore the half century of development in negligence law originating in Mac Pherson . . .

42 N.C. App. at 265-266, 254 S.E.2d at 55.

In *Mayor & City Council, etc. v. Clark-Dietz, etc.*, 550 F. Supp. 610, 624 (N.D. Miss. 1982), a case cited as authority by Wausau and Houston in their brief, the United States District Court cited the above authorities, and quoted from W. Prosser, *Handbook of the Law of Torts*, § 93, p. 622 (4th ed. 1971):

> By entering into a contract with A, the defendant may place himself in such a relationship toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters a course of affirmative conduct which may be expected to affect the interests of another person. (Emphasis added)

In addition, as *Mayor & City Council, supra*, notes, the owner as a matter of law has an implied warranty with the contractor with whom he contracts that the plans and specifications furnished the contractor

are not defective. 55 F. Supp. at 625. The owner and contractor are in privity, however, and any failure by the owner to furnish adequate plans and specifications to the contractor imposes a contractual as well as tort liability in favor of the contractor upon the owner. *Trustees of First Baptist Church v. McElroy*, 223 Miss. 327, 334, 78 So. 2d 138, 141 (1955).

It is thus clear that if any liability were to be imposed upon the Commission for injuries to these parties, it would have to be premised upon a tort liability arising from negligently defective plans and specifications, but not upon any contractual obligation to them. Wausau and Houston ignore this distinction.

The Commission is immune from all suits for negligence on the part of its employees unless by legislative enactment sovereign immunity has been waived. *Pruett v. City of Rosedale*, 421 So. 2d 1046

(Miss. 1982); Miss. Code Ann. § 11-46-1, et. seq. (Supp. 1990).

In *Strait v. Pat Harrison Waterway Dist.*, 523 So. 2d 36 (Miss. 1988), we held that no political subdivision or agency of the state can be sued in the absence of a clear and unambiguous statute waiving sovereign immunity. In that case a district waterway, pursuant to a statute authorizing it to do so, Miss. Code Ann. § 51-15-120 (Supp. 1990), procured liability insurance, the premium for which was paid by public funds. Thereafter, an injured patron sued to recover to the extent of the policy coverage. We held, in what must surely have appeared somewhat anomalous to the injured plaintiff and his counsel, that the Legislature, by the language of § 51-15-120 without more, had not intended to waive sovereign immunity. Thus has this Court jealously, if not indeed zealously, thrown the

protective blanket of sovereign immunity to all activities of the state, its agencies and political subdivisions in the absence of a clearcut unequivocal statute waiving it.

Because this is a claim against the Commission in tort, the dismissal must be affirmed.

In fairness to Wausau and Houston, it should be noted that because the dismissal by the circuit judge was based upon an interpretation of the Commission's and Cook's contract, the issue of sovereign immunity on appeal has not been directly addressed by the parties. We find the answer so clearcut, however, that we see no reason to remand for the circuit judge to consider this question. The appellants will not be deprived of the opportunity to convince us otherwise in a petition for rehearing.

AFFIRMED.

ROY NOBLE LEE, C.J., DAN LEE, P.J., PRATHER, ROBERTSON, SULLIVAN, ANDERSON AND BLASS, JJ., CONCUR. PITTMAN, J., NOT PARTICIPATING.

APPENDIX

APPENDIX "B"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-CA-0667

EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY, AND HOUSTON
GENERAL INSURANCE COMPANY

v.

MISSISSIPPI STATE HIGHWAY COMMISSION
AND DOES I THROUGH XX, INCLUSIVE

BEFORE HAWKINS, P.J., SULLIVAN AND BLASS, JJ.

HAWKINS, PRESIDING JUSTICE, FOR THE COURT:

Employers Insurance of Wausau, a Wisconsin-based insurance corporation (Wausau), and Houston General Insurance Company, a Texas-based insurance

corporation (Houston), appeal from a summary judgment dismissal of their complaint against the Mississippi State Highway Commission (Commission) in which as assignees of injured parties they sued the Commission for breach of its implied warranty that Commission's plans and specifications to a contract for resurfacing would provide a reasonably safe highway. The circuit judge found there was no contractual liability for such injury. We find that the Commission, as an agency of the sovereign state, is immune from such liability and affirm.

FACTS

The Commission on December 8, 1982, contracted with Cook Construction Company (Cook) to resurface a portion of Interstate 55 from Glukstadt to Highway 22 in Madison County. The contract required Cook to apply a pavement mixture designed and

manufactured in accordance with plans and specifications provided by the Commission.

Cook followed the plans and specifications of the Commission in manufacturing the pavement mixture, but the mixture was defective, resulting in an unreasonably slick highway. Due to this condition, three different automobiles on three different occasions had accidents causing severe injuries to three individuals.

On June 11, 1985, Cook filed a suit against the Commission in the chancery court of the First Judicial District of Hinds County for defective plans and specifications furnished it by the Commission. This action was later settled.

Kenneth Sebren was injured on July 13, and thereafter Ivory Chambers was injured August 10, and Alvin Russell Clark injured September 16, 1983, all from automobile accidents on the portion of the highway

which had been resurfaced. Each of them either filed a suit against Cook, or made demand on Cook for personal injury damages. Cook's liability insurance carriers reached compromise settlements with these individuals and their wives, and were assigned their respective claims against the Commission.

On April 3, 1986, Kenneth R. Sebren and his wife Harriet in consideration of $55,000 to himself, $75,000 to Harriet, and $20,000 to Lumberman's Underwriting Alliance to reimburse that company for worker's compensation benefits, all paid by Wausau and Houston, executed a complete release of Cook and its carriers, and assigned all rights they had against the Commission to Wausau and Houston. On March 26, 1986, Alvin Russell Clark and his wife executed the same type of document for $20,000. Also, on March 27, 1986, Ivory Chambers and his wife Louella

for $188,904.37 being paid to him, and $11,095.63 being paid to New Hampshire Insurance Company as reimbursement for worker's compensation benefits, executed the same type of document to Wausau and Houston.

Wausau and Houston filed a complaint against the Commission in the circuit court of the First Judicial District of Hinds County. The complaint charged that Cook was contractually obligated to apply a mixture for resurfacing designed and manufactured in accordance with the plans and specifications provided Cook by the Commission. The complaint further alleged that there was as a matter of law an implied warranty by the Commission that if Cook followed this recipe a reasonably safe, suitable road surface would result. Cook complied, followed the Commission's recipe, which resulted in a hazardous, dangerous surface. The

complaint further alleged that Sebren, Clark and Chambers suffered severe personal injuries as a result of this slick, defective highway, and finally that as assignees of these individuals the plaintiffs were entitled to $600,000 damages for injuries to Chambers, $450,000 damages for injuries to Sebren, and $60,000 damages for injuries to Clark.

On December 2, 1987, the Commission filed a motion for summary judgment and dismissal of the action. The motion first alleged that plaintiffs sought damages as indemnees of Cook, but there was no showing that Cook had paid any sum as a result of the negligence of the Commission. Secondly, the motion raised the defense of sovereign immunity.

The plaintiffs responded that their claim was not one for indemnity but on behalf of the persons protected under the implied warranty of the Commission to

furnish plans and specifications providing for a reasonably safe surface on the highway.

The circuit judge sustained the motion by order dated December 20, 1988, which provided in pertinent part:

> The precise issue of sovereign immunity put by this case, where implied warranties expose state agencies to what would otherwise be tort liability, is one of first impression in this state. That issue need not be reached, however, because this court concludes that this action is barred by the terms of the contract on which it is based. Incorporated into this contract is a provision which provides as follows:
>
> > 107.15 - Third Party Beneficiary Clause:
> >
> > It is not intended by any of the provisions of any part of the contract to create the public or any member thereof a third party beneficiary hereunder, or to authorize anyone not a party to this contract to maintain a suit

> for personal injuries or property damage pursuant to the terms or provisions of this contract. The duties, obligations and responsibilities of the parties to this contract with respect to third parties shall remain as imposed by law.

This provision is clear and unambiguous and bars this action. Accordingly, it is hereby,

Ordered, that the Motion for Summary Judgment filed on behalf of the defendant Mississippi State Highway Commission be and the same is hereby GRANTED.

LAW

Wausau and Houston have appealed, alleging the contract was ambiguous, citing another section, and contending that summary judgment was improper. We decline to reach the contract provisions, however, because this suit is not based upon any specific contract provisions, but an implied warranty arising from the

contract to furnish plans and specifications to Cook providing for a reasonably safe and suitable highway. Under that theory, any claim for damages by Wausau and Houston as assignees of these individuals must be in tort, and for this reason the doctrine of sovereign immunity applies.

We first note that Wausau and Houston make no claim that the Commission, as an agency of the State of Mississippi, does not possess all the attributes of state sovereign immunity. They simply argue that sovereign immunity does not apply to the Commission's implied warranty to furnish reliable plans and specifications to Cook. We also note that they make no claim as indemnees of Cook. We therefore have no occasion to address whether there would be liability on the part of the Commission if it did not enjoy sovereign immunity but were instead a private person, or what rights Cook

might have asserted, or perhaps did assert in its cause against the Commission.

In *Engle Acoustic & Tile, Inc. v. Grenfell*, 223 So. 2d 613 (Miss. 1969), a subcontractor sued the project architect for damages caused by his failure to carry out his contractual duties. We noted that the contract was between the architect and owner, and "that one not a party to a contract can sue for a breach thereof only when the condition which is alleged to have been broken was placed in the contract for his direct benefit. A mere incidental beneficiary acquires by virtue of the contractual obligation no right against the promisor or the promisee." *Id.* at 620.

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tort liability, thereby abolishing privity in a negligence claim. *Mac Pherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

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> By entering into a contract with A, the defendant may place himself in such a relationship toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters a course of affirmative conduct which may be expected to affect the interests of another person. (Emphasis added)

In addition, as *Mayor & City Council, supra*, notes, the owner as a matter of law has an implied warranty with the contractor with whom he contracts that the plans and specifications furnished the contractor

are not defective. 55 F. Supp. at 625. The owner and contractor are in privity, however, and any failure by the owner to furnish adequate plans and specifications to the contractor imposes a contractual as well as tort liability in favor of the contractor upon the owner. *Trustees of First Baptist Church v. McElroy*, 223 Miss. 327, 334, 78 So. 2d 138, 141 (1955).

It is thus clear that if any liability were to be imposed upon the Commission for injuries to these parties, it would have to be premised upon a tort liability arising from negligently defective plans and specifications, but not upon any contractual obligation to them. Wausau and Houston ignore this distinction.

The Commission is immune from all suits for negligence on the part of its employees unless by legislative enactment sovereign immunity has been waived. *Pruett v. City of Rosedale*, 421 So. 2d 1046

(Miss. 1982); Miss. Code Ann. § 11-46-1, et. seq. (Supp. 1990).

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protective blanket of sovereign immunity to all activities of the state, its agencies and political subdivisions in the absence of a clearcut unequivocal statute waiving it.

Because this is a claim against the Commission in tort, the dismissal must be affirmed.

AFFIRMED.

ROY NOBLE LEE, C.J., DAN LEE, P.J., PRATHER, ROBERTSON, SULLIVAN, ANDERSON AND BLASS, JJ., CONCUR. PITTMAN, J., NOT PARTICIPATING.

APPENDIX

APPENDIX "C"

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY; AND HOUSTON
GENERAL INSURANCE COMPANY PLAINTIFFS

VS. NO. 35,589

MISSISSIPPI STATE HIGHWAY
COMMISSION, AND DOES I
THROUGH XX, INCLUSIVE DEFENDANTS

OPINION AND ORDER

This matter is before the court on defendant Mississippi State Highway Commission's (the "Commission") Motion for Summary Judgment and Dismissal. The Commission contends that this action is

barred by the doctrine of sovereign immunity and res adjudicata, that plaintiffs lack standing and that the terms of the contract upon which plaintiffs base their action bars recovery.

Plaintiffs in this case are insurance companies and assignees of claims brought against their insured, a construction company which contracted with the Commission to construct a highway. Plaintiffs assignors were all injured as a result of accidents caused by what plaintiffs allege to be faulty asphalt specifications supplied by defendants to plaintiffs' insured. The injured parties brought actions against plaintiffs' insured in the Chancery Court of Hinds County and, pursuant to a compromise settlement, plaintiffs were assigned the rights of the injured parties. Plaintiffs, as assignees, now bring this action alleging a breach of implied warranty, contending that defendant Commission

impliedly warranted, as a matter of law, that a reasonably safe, suitable road surface would be achieved by following the specifications supplied by it.

The precise issue of sovereign immunity put by this case, whether implied warranties expose state agencies to what would otherwise be tort liability, is one of first impression in this state. That issue need not be reached, however, because this court concluded that this action is barred by the terms of the contract on which it is based. Incorporated into this contract is a provision which provides as follows:

> **107.15 - Third Party Beneficiary Clause:**
>
> It is not intended by any of the provisions of any part of the contract to create the public or any member thereof a third party beneficiary hereunder, or to authorize anyone not a party to this contract to maintain a suit for personal injuries or property damage pursuant to the terms or provisions of this contract. The duties, obligations and

> responsibilities of the parties to this contract with respect to third parties shall remain as imposed by law.

This provision is clear and unambiguous and bars this action. Accordingly, it is hereby,

Ordered, that the Motion for Summary Judgment filed on behalf of the defendant Mississippi State Highway Commission be and the same is hereby GRANTED.

Ordered this 20th day of December, 1988.

/s/ Fred L. Banks, Jr.
Circuit Judge

Supreme Court, U.S.
FILED
AUG 1 1991
OFFICE OF THE CLERK

(2)

No. 90-1872

In The

Supreme Court of the United States

October Term, 1991

EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY, AND
HOUSTON GENERAL INSURANCE COMPANY,

Petitioners,

vs.

MISSISSIPPI STATE HIGHWAY COMMISSION AND
DOES I THROUGH XX, INCLUSIVE,

Respondents.

Petition For A Writ Of Certiorari To The Mississippi Supreme Court

BRIEF IN OPPOSITION

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Respondents.

Petition For A Writ Of Certiorari To The Mississippi Supreme Court

BRIEF IN OPPOSITION

The Mississippi State Highway Commission files its Response to Petition for a Writ of Certiorari, and asks the Court not to grant certiorari in the above referenced action.

JURISDICTION

Since the Constitutional question raised in this Petition was not raised in the Mississippi Supreme Court, this Court is without jurisdiction. 28 U.S.C. §1257. Rule 21.1

(h), Rules of Supreme Court of the United States. *Webb vs. Webb,* 451 U.S. 493 (1981).

REASONS FOR DENYING THE WRIT

I.

The United States Supreme Court Does Not Have Jurisdiction In this Case

The federal question which petitioner asserts in this case was not raised below. Therefore this Court is without jurisdiction and should refuse to grant certiorari.

The U.S. Supreme Court will hear a case arising from a state court judgment only when the record shows that the federal issue was properly raised by petitioner below, *Webb vs. Webb,* 451 U.S. 493. At no time during the state court proceedings in this action did petitioner raise the constitutional issue now being asserted. It does not appear in any of petitioners' briefs, nor is it addressed in the opinion of the Mississippi Supreme Court.

The fatal jurisdictional defect of failing to raise a federal issue below when bringing a case from a state court was discussed by this Court in *Webb,* 451 U.S. at 495-499. This Court held that it has a long settled jurisdictional rule precluding the re-examination of the final judgment of a state court if the record fails to show either expressly or by clear implication that a federal claim was adequately raised in the state courts. 451 U.S. at 496, 497. The Court cited several cases which uphold the rule that it refuses to decide federal constitutional issues raised for the first time on review of state court decisions. 451 U.S. at 498, 499.

This case is clearly one which falls within the scope of the rule explained in *Webb*. The U.S. Supreme Court does not have jurisdiction in this case, and should not grant certiorari.

II.

Petitioners Have Not Been Denied Access to the Courts Unconstitutionally

A.

The Mississippi Supreme Court Could Sustain the Lower Court's Decision to Grant Summary Judgment on Any Grounds for which there was Basis in the Record.

In the case at bar the Mississippi Supreme Court upheld the trial court's dismissal of petitioner's lawsuit against the Highway Commission. However, the Mississippi Court upheld the dismissal on the grounds that the Highway Commission was entitled to sovereign immunity, instead of the exclusionary language in the insurance policy issued by petitioners which was relied on by the trial court in its dismissal.

It has long been held that an appellate court may sustain a lower court's decision on other grounds than those on which the lower court based its decision. *Davis vs. Packard*, 31 U.S. 41, 48 (6 Pet. 41) (1832). *M'Clung vs. Silliman*, 19 U.S. 598, 603 (6 Wheat. 598) (1821).

"The question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed." 19 U.S. at 603. In a more current ruling this Court held that the Circuit Court of Appeals must uphold a decision of the Board of Tax Appeals which was correct even though the lower court gave a

wrong reason for its action. *J.E. Riley Inv. Co. vs. Commissioner of Internal Revenue,* 311 U.S. 55, 59 (1940).

In a case in which the Mississippi Supreme Court found two independently dispositive reasons why as a matter of law the appellants were not entitled to the relief they requested on appeal, the Court held that appellees are entitled to argue any grounds sufficient to sustain the judgment or reject the appeal. *Ferguson, et al. vs. Watkins,* 448 So. 2d 271, 275 (Miss. 1984). The Mississippi Court has also consistently held that if the action of the trial judge can be upheld for any reason it must be affirmed. *Chatham vs. Johnson,* 195 So.2d 62 (Miss. 1967). The Mississippi Court also holds that if the trial court reaches the correct conclusion, although for the wrong reason, the lower court decision will be upheld. *Taylor vs. F. & C. Contracting, Inc.,* 362 So.2d 625, 628 (Miss. 1978). *Briggs vs. Benjamin,* 467 So.2d 932, 934 (Miss. 1985)

The Mississippi Supreme Court was acting within its authority in upholding the trial court's dismissal on grounds other than those on which the trial court relied. Petitioners were not denied any constitutionally protected right by the Mississippi Court's action.

B.

***Robinson vs. Ariyoshi* Does Not Apply To This Case**

Petitioners' argument relies heavily on the case of *Robinson vs. Ariyoshi,* 441 F.Supp. 559 (D. Hawaii 1977) (Robinson I). This case is not analogous to the current case.

This case was one link in a chain of cases which began in the state court of Hawaii for the determination of certain water rights of the parties. 441 F.Supp. at 562-563. See also, *Robinson vs. Ariyoshi*, 887 F. 2d 215, 216-218 (9th Cir. 1989), in which the complaints in Robinson I were ultimately ordered dismissed. 887 F.2d at 219.

The plaintiffs in Robinson I were complaining of an action in which the Supreme Court of Hawaii abrogated previously existing state water rights law, and declared new water rights doctrine for the state of Hawaii sua sponte without argument from any of the parties. 441 F.Supp. at 563-564. In the case at bar, the Mississippi Supreme Court has not made new law. The Mississippi Court, in the case at bar, simply relied on different legal grounds, the existing state law of sovereign immunity, to uphold the decision of the lower court.

The Mississippi Supreme Court did not make new law, nor did it make findings of fact ab initio. Petitioners' assertion that this occurred is not accurate.

CONCLUSION

This Court does not have jurisdiction in this action due to the fact that the petitioners did not raise a constitutional claim in the state court. *Webb vs. Webb*, 451 U.S. 493 (1981).

In addition, the Mississippi Supreme Court was clearly within its authority to uphold the trial court's

dismissal of the petitioners' complaint on legal grounds other than those relied upon by the trial court.

Respectfully submitted,

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